Filed 3/25/19 In re J'm CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J'm et al., Persons Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.C., Defendant and Appellant.	B291006 (Los Angeles County Super. Ct. 18CCJP01644A-B)

APPEAL from orders of the Superior Court of Los Angeles County, Veronica McBeth, Judge. Affirmed and remanded with directions.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

Appellant T.C. (Mother), the mother of two young children, "J'm" and J'n," and formerly a resident of Missouri, appeals the juvenile court's jurisdictional and dispositional orders, raising procedural issues under the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, § 3400 et seq., UCCJEA) and the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., ICWA). She contends the court committed reversible error by failing to expressly state its basis for finding jurisdiction appropriate in this state, and in failing to place in the record a description of the discussion between the California judge presiding over the underlying matter and a Missouri judge concerning which state's courts should exercise jurisdiction over the family. Mother further contends that the juvenile court and the Department of Children and Family Services (DCFS) violated ICWA by failing to sufficiently inquire of Mother's relatives concerning her claim to Indian ancestry, and by failing to send notice to a tribe identified by Mother. There is no dispute that we must conditionally remand for ICWA compliance. We conclude that any error in failing to comply with the UCCJEA's procedural requirements was harmless, but as

the matter must be remanded, Mother's trial counsel will have the opportunity to clarify the record concerning jurisdiction under the UCCJEA should he or she deem it necessary.

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the DCFS in March 2018, when J'm and J'n were three and two.[1] While with the children at a movie theater, Mother, who had a prior history of mental illness and had been placed on a hospital hold twice before, reported hearing voices telling her to hurt herself. J'm said they had been sleeping at the theater. Mother admitted they were homeless. Mother was placed on a psychiatric hold. At the March 14, 2018 detention hearing, the court detained the children.[2] On June 4, 2018, the court sustained jurisdiction under Welfare and Institutions Code section 300, subdivision (b) (failure to protect) based on Mother's having "mental and emotional problems including auditory hallucinations and suicidal ideations" which

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[1] Because the issues on appeal are unrelated to the jurisdictional facts, we summarize them only briefly.

[2] The children were initially placed in foster care. By the time of the jurisdictional hearing, the children were living with a maternal aunt in California, who was unable to care for them long-term. The court ordered initiation of an ICPC (Interstate Compact for the Protection of Children) to permit DCFS to move the children to an aunt in St. Louis.

rendered her incapable of providing regular care for the children.

A. *Facts and Proceedings Pertinent to Jurisdictional Issue*

When interviewed by the caseworker, Mother referred to St. Louis, Missouri as her "home town." She had a Missouri driver's license in her possession. She stated she had moved to California from St. Louis to live with her sister after her mother and the children's father died in 2016, but had not stayed with her sister for very long.[3] She asked to be returned to St. Louis, where she and the children had been earlier in the year, because "they gave me my kids back in St. L[o]uis and there was no Court."

The caseworker contacted the child protective services agency in Missouri and learned that Mother had an open investigation for physical abuse initiated on February 6, 2018. The caseworker later learned that referral and another from January 2018 had been closed.

In March 2018, prior to the jurisdictional hearing, the caseworker spoke with several relatives. A paternal great-grandmother, Yvonne M., who lived in St. Louis, said that after the children's father died, Mother moved to Los Angeles to live with her sister, April B. April said Mother and the children lived with her for three months in 2016.

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[3] The maternal grandmother died in January 2016. The children's father died in October 2016.

Thereafter, Mother and the children lived with Yvonne in St. Louis "for a while," and Yvonne paid for Mother to fly back and forth between St. Louis and Los Angeles. April said that she heard from Mother on March 10, 2018 and was unaware Mother had returned to California. She believed Mother and the children had been staying with the children's paternal grandmother in Texas.

At the March 14, 2018 detention hearing, Mother's counsel asked the court and DCFS to explore whether California or Missouri had jurisdiction under the UCCJEA. The court instructed DCFS to determine whether there was an open case in Missouri and set a date of March 28 to explore jurisdictional issues.

The record indicates there was a hearing on March 28 presided over by Judge McBeth, although it contains no transcript for that hearing. At an April 4 hearing before Judge Trendacosta, counsel for Mother asked that the matter be dismissed for lack of jurisdiction. Counsel for DCFS reported that DCFS had contacted Missouri and learned were no open cases pending, and that "Missouri was not willing to accept any responsibility for [the] case." The court replied: "But that's not the law. [The children] were here less than six months. Their state of residence is Missouri. We have emergency jurisdiction. The court can act if the court in Missouri decides not to act, but that's got to be judge to judge, not department to department. . . . [¶] . . . What needs to happen is that Judge McBeth needs to contact the presiding judge of the juvenile court of whatever

county it is. . . . [¶] If a judge in Missouri decides that they wish to accept the case and ask for a filing, they can do that. If they do[] then the issue raised by counsel is right . . . ." The court put the matter over for the jurisdictional issues to be resolved.

Judge McBeth presided at the next hearing on May 1, 2018. The reporter's transcript indicates there was an off-the-record discussion with counsel before the hearing began. On the record, counsel for Mother discussed the fact that DCFS was contemplating moving the children to Missouri to be with relatives there, and informed the court that Mother wished to move back there for services. Judge McBeth stated she would call the presiding judge in "St. Louis County, . . . which is where the six referrals that we discussed were," although she "doubt[ed]" the Missouri court would accept the case.[4] At a followup hearing on May 30, Judge McBeth stated: "[W]e're having discussion with the judge in St. Louis, Missouri, who . . . agrees that they should have jurisdiction over this matter given the information that this court has. We will not know until Monday[;] the information regarding the open case here is being sent to

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[4] Mother points out that there are separate courts for the city of St. Louis and the county in which it is located, and suggests that Judge McBeth's conversations were with the wrong judicial officer. Because Judge McBeth identified the judge as being from the court "where the . . . referrals . . . were," we presume she was in contact with a judge from the appropriate judicial locality.

Missouri, to see if children's services there . . . will be filing there so that we can transfer the case."

At the next reported hearing, on June 4, 2018, the court sustained the jurisdictional petition without mention of the discussion with the Missouri judge or the UCCJEA. Counsel for Mother objected to the court's sustaining the allegations, but raised no jurisdictional or UCCJEA issues. In her closing argument, DCFS's counsel stated: "[Mother's] moving from place to place because she doesn't like the things that she's being told to do. I think this is the third state she's been in. . . . [S]he was in Texas and before then she was in Missouri." When it issued its ruling, the court observed: "Based on having read all the reports that have been admitted into evidence, the last minute, the detention and jurisdiction report, this is the third state Mother has lived in and she's had problems in all of them." The court stated that there had been six referrals in St. Louis County, and that "it looks like [Mother] moves around anytime anybody gets even sort of close [to noticing her inability to take care of her children]."

B. *Facts and Proceedings Relevant to ICWA*

At the March 14, 2018 detention hearing, Mother claimed Indian heritage and suggested that her sister, April B., be contacted for further information. The court directed DCFS to investigate. April suggested the caseworker call a different maternal aunt, Felicia B. The caseworker called Felicia and left a detailed message. The call was not

returned. The caseworker spoke to Mother again about her heritage, and Mother said her mother was part of the Otoe tribe. The record contains no indication of any further attempt to comply with ICWA.

DISCUSSION

A. *Jurisdiction*

"California adopted the UCCJEA effective January 1, 2000. [Citations.]" (*Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1287 (*Schneer*); accord, *In re Aiden L.* (2017) 16 Cal.App.5th 508, 516 (*Aiden L.*).) Missouri adopted it in 2009. (*Hightower v. Myers* (2010) 304 S.W.3d 727, 732, fn. 4.) "The UCCJEA is the exclusive method of determining subject matter jurisdiction in child custody cases. [Citations.]" (*Schneer*, *supra*, at p. 1287; accord, *Aiden L.*, *supra*, at p. 516; see Fam. Code, § 3421, subd. (b).) "Subject matter jurisdiction over a child custody dispute either exists or does not exist at the time the petition is filed, and jurisdiction under the UCCJEA may not be conferred by mere presence of the parties or by stipulation, consent, waiver, or estoppel. [Citation.]." (*Schneer*, *supra*, at p. 1287; accord, *Aiden L.*, *supra*, at p. 516.) "If a question of existence or exercise of jurisdiction under this part is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously." (Fam. Code, § 3407.)

The role of the appellate court, once the juvenile court has evaluated and resolved conflicts in the evidence and

made its findings concerning jurisdiction under the UCCJEA, "is to ensure that the provisions of the UCCJEA have been properly interpreted and that substantial evidence supports the factual basis for the juvenile court's determination whether California may properly exercise subject matter jurisdiction in the case." (*Aiden L.*, *supra*, 16 Cal.App.5th at p. 520.) "'[A]ppellate courts do not reweigh facts and generally must defer to the trial court's resolution of credibility and conflicts in the evidence.'" (*Id.* at p. 519.)

Section 3421 of the Family Code provides the basic outline for establishing a California court's territorial jurisdiction over a child. It states that other than in emergency situations (discussed below), "a court of this state has jurisdiction to make an initial child custody determination only if any of the following are true: [¶] (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.[5] [¶] (2) A court of another state does not have

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5 "'Home state'" is defined to mean "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." (Fam. Code, § 3402, subd. (g).) When calculating the six months, "[a] period of temporary absence . . . is part of the period." (*Ibid.*) As explained in *Ocegueda v. Perreira* (2015) 232 Cal.App.4th 1079, 1087-1088, it is "'significant that
(*Fn. is continued on the next page.*)

jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under Section 3427 or 3428,[6] and both of the following are true: [¶] (A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence. [¶] (B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships. [¶] (3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 3427 or 3428. [¶] (4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3)."

In addition, a court of this state is entitled to assert temporary emergency jurisdiction if the child is present in

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the Legislature chose the word "lived" as opposed to "resided" or "was domiciled." The test for "residence" or "domicile" typically involves an inquiry into a person's intent. [Citation.] In our view, the Legislature used the word "lived" "precisely to avoid complicating the determination of a child's home state with inquiries into the states of mind of the child or the child's adult caretakers."'"

6 Family Code section 3427 provides that a court may decline jurisdiction based on forum non conveniens. Section 3428 provides that a court may decline to exercise jurisdiction due to the "unjustifiable conduct" of a party.

the state and assertion of such jurisdiction is necessary to protect the child. (Fam. Code, § 3424.) If the California court asked to issue an emergency order under section Family Code section 3424 is "informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under [the UCCJEA]," the California court "shall immediately communicate with the other court." (*Id.* at subd. (d).) Moreover, even if the California court "is exercising jurisdiction pursuant to Sections 3421 to 3423," once it learns that "a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section," it is required to "immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order." (Fam. Code, § 3424, subd. (d); see also § 3426, subd. (b) ["[A] court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties . . . . If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this part, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this part does not

determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding."].)

Family Code section 3424 does not appear to require judicial communication if there is no previous child custody determination from another state that is entitled to be enforced under the UCCJEA and no child custody proceeding has been commenced in a court of a state having jurisdiction as defined in the act. Subdivision (b) of Family Code section 3424 provides that where no proceedings involving the child have taken place in the courts of another state, a temporary emergency child custody determination issued by a California court "remains in effect until an order is obtained from a court of a state having jurisdiction," and further provides that "[i]f a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction . . . , a child custody determination made under this section becomes a final determination, if it so provides and this state becomes the home state of the child." (Fam. Code, § 3424, subd. (b).) Nonetheless, at least two courts have held that if the California court issuing an emergency order "is aware that another state (or foreign country) qualifies as the child's home state, the California court must contact the home state court to give it an opportunity to decide whether to exercise its home state jurisdiction. [Citations.]" (*Aiden L.*, *supra*, 16 Cal.App.5th at pp. 518-519; accord, *In re Gino C.* (2014) 224 Cal.App.4th 959, 964, 966 [sole avenue for California court to obtain home state jurisdiction over children is for the children's home country or state to expressly "decline to

exercise its home state jurisdiction," and California court must either contact children's home country or state or "provid[e] a time-limited order giving the parties an opportunity to file a custody action in [the home country or state]"]; but see *In re Angel L.* (2008) 159 Cal.App.4th 1127, 1138-1141 [rejecting father's contention that California judge should have contacted Nevada judge before asserting jurisdiction where children's home state was Nevada, but children were found in exigent circumstances during a visit to California, no Nevada court had issued custody orders, and no Nevada case was pending]; cf. *In re E.R.* (2018) 28 Cal.App.5th 74, 80, 81, italics added [rejecting parents' contention that discussions concerning jurisdiction between California judge and judge of home state of children (Nevada) were improper: "A court of one state *may* communicate with a court of another state before deciding to decline jurisdiction."].)

Here, when the proceedings began, there was a concern that a Missouri court had initiated a proceeding at the request of Missouri's child protective services agency. However, DCFS and the court soon established that was not the case: Missouri's agency had investigated Mother in early 2018, but had filed no formal proceedings. There was also a possibility that Missouri was the children's home state by virtue of the family's having lived there the preceding six months if their presence in California was "[a] period of temporary absence[.]" (See Fam. Code, § 3402, subd. (g).) By the time of the jurisdictional hearing, however, the

evidence established that Mother had been living a transient lifestyle since leaving her sister April's California home in 2016, moving between three states -- Missouri, California and Texas -- to avoid any state's attempt to intervene and address the family's problems.[7] Accordingly, notwithstanding Judge Trendacosta's earlier comments, Missouri was not the children's home state or state of residence, and the court below could properly claim jurisdiction under Family Code section 3421, subdivision (a)(4), applicable when "no court of any other state would have jurisdiction" under the criteria specified in the other paragraphs of subdivision (a).

It appears, however, that the court failed to comply with Family Code section 3410, which provides that "[a] court of this state may communicate with a court in another state concerning a proceeding arising under this part" (Fam. Code, § 3410, subd. (a)), and that if it does so, "a record must be made of [the] communication [between judges] under this section" (*id*. subd. (d)); and "[t]he parties must be informed promptly of the communication and granted access to the record." (*Ibid*.) Discussing subdivision (d) of Family Code section 3410, the court in *In re C.T.* (2002) 100 Cal.App.4th 101 found that the provision did not require the court to record the conversation "verbatim," but that compliance

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[7] Mother herself acknowledges in her brief: "One thing is very clear -- after the death of her mother and the death of the father of the children, [Mother] moved about the country and never really established a permanent abode within the meaning of the UCCJEA."

could be achieved by describing the conversations "in memoranda" and "on the record during a hearing the day following each conversation." (*Id.* at pp. 111, 112.) "Although a verbatim transcript would effectively avoid disputes as to the content of these conversations, the statute does not require tape recordings or reporter's transcripts of the intercourt conversations." (*Id.* at p. 112.) Moreover, compliance with section 3410, subdivision (d) is not jurisdictional; it is a procedural requirement that may be forfeited if the parties fail to bring the matter to the court's attention (*In re A.C.* (2017) 13 Cal.App.5th 661, 671-672), and failure to comply constitutes reversible error only if it resulted in prejudice. (*In re R.L.* (2016) 4 Cal.App.5th 125, 143.)

Mother's trial counsel forfeited any claim of error by failing to bring this matter to the court's attention at the June 4 hearing. To the contrary, after having raised UCCJEA jurisdictional issues at several prior hearings, Mother's trial counsel acquiesced in the court's decision to render a finding under Welfare and Institutions Code section 300 without further discussion of the UCCJEA or Judge McBeth's conversation with the Missouri judge. Moreover, appellant does not explain how the failure to place Judge McBeth's conversations on the record was prejudicial to her. Accordingly, Judge McBeth's failure to make a record of her communication with the Missouri judge was not reversible error. We note, moreover, that as we must remand for

ICWA compliance, Mother's trial counsel will have an opportunity to seek clarification of the record.

B. *ICWA Compliance*

ICWA requires "notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.'" (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8, quoting 25 U.S.C. § 1912(a).) The notice "ensures that an Indian tribe is aware of its right to intervene in or, where appropriate, exercise jurisdiction over a child custody proceeding involving an Indian child." (*In re Isaiah W.*, *supra,* at p. 8.) No proceeding to place a child in foster care or terminate parental rights can be held "until at least ten days after receipt of [ICWA] notice by the parent or Indian custodian and the tribe . . . ." (25 U.S.C. § 1912(a).) "After proper notice has been given, if the tribes respond that the minor is not a member or not eligible for membership, or if neither the [Bureau of Indian Affairs] nor any tribe provides a determinative response within 60 days, then the court may find that ICWA does not apply to the proceedings." (*In re Isaiah W.*, *supra*, at p. 15.)

ICWA's notice requirements are triggered when a parent expresses the belief that he or she has Indian heritage and names the tribe or identifies a parent or grandparent who may have been Indian. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257-258; *In re*

Miguel E. (2004) 120 Cal.App.4th 521, 549-550; see *In re D.C.* (2015) 243 Cal.App.4th 41, 63 [explaining "'it is preferable to err on the side of giving notice . . . .'"].) If necessary to clarify information received from the parent, the caseworker must "make further inquiry regarding the possible Indian status of the child . . . as soon as practicable" after the issue of Indian heritage arises, by interviewing "extended family members" and "any . . . person [who] reasonably [can] be expected to have information regarding the child's membership, citizenship, status or eligibility." (Wel. & Inst. Code, §224.2, subd. (e).) Where the record indicates the caseworker failed to make adequate inquiry after receipt of information indicating the children involved in the proceeding might be Indian children, remand for ICWA compliance is required. (See, e.g., *In re Michael V.* (2016) 3 Cal.App.5th 225, 235-236 [remand for department to conduct "meaningful investigation" into claim of Indian ancestry where it made no effort to locate and interview children's maternal grandmother although she had reported link to tribe]; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167-1168 [matter remanded where caseworker failed to interview paternal grandmother after receiving conflicting information about possible Indian heritage from child's biological father].)

Mother asserts and respondent does not dispute that the matter must be remanded for ICWA compliance. A majority of courts, including this one, have held that a failure to comply with ICWA does not represent

jurisdictional error, and that orders entered during the period of noncompliance are not void. (*Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268-269, and cases cited therein.) Unless the order appealed is one terminating parental rights, the order may be affirmed with directions to the juvenile court to ensure compliance with ICWA notice requirements; thereafter, if the minor is determined to be an Indian child, interested parties are permitted to petition the court to invalidate orders that violated ICWA. (*Ibid.*; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385; accord, *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 ["When it is shown that the court or department knew or had reason to know the child was an Indian child but failed to make an inquiry, we remand with instructions to ensure compliance with ICWA; however, in doing so, we do not reverse the jurisdictional or dispositional orders where there is not yet a sufficient showing that the child is, in fact, an Indian child within the meaning of ICWA"].) Accordingly, we will conditionally affirm the court's jurisdictional and dispositional orders and remand the matter for compliance with ICWA.

DISPOSITION

The court's jurisdictional and dispositional orders are affirmed. The matter is remanded with directions to the juvenile court to order DCFS to comply with ICWA notice and inquiry requirements as set forth above.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.